No. 17-269

In The Supreme Court of the United States

WASHINGTON,

Petitioner,

v.

UNITED STATES, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON STATE AND LOCAL OFFICIALS (CURRENT AND FORMER) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of elected Washington officials (current and former) at both the state and local level. They are deeply familiar with the problem of dwindling salmon stocks, and have first-hand experience grappling with intertwined federal and state laws that mandate protection of

[1] This brief is filed with the consent of all parties. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

salmon species and their habitat. *Amici* also have experience investing in and overseeing habitat conservation and restoration efforts, including barrier culvert removal, and have worked in partnership with Indian tribes who share the common goal of ensuring the sustainability of Washington's salmon resources. *Amici* have done so despite facing budget constraints similar to those invoked by the State: They have worked collaboratively through watershed planning efforts and state salmon recovery forums to leverage federal, state, and local resources, and have advocated for new funding models when necessary.

Amici offer their perspective to inform the Court of the longstanding commitment of state and local officials in Washington to the protection and restoration of salmon stocks, and to highlight the efforts of cities, counties, and other local entities in working to ensure that barriers to fish passage are removed and salmon populations are given all possible opportunities to thrive. The State's position in this case is fundamentally inconsistent with the shared public interest in those efforts.

Amici include:

- Dow Constantine, Executive of King County, the most populous county in Washington. Before serving as County Executive for the last nine years, Mr. Constantine was elected to serve in the King County Council, Washington State House of Representatives, and the State Senate.

- Phil Anderson, member of the Pacific Salmon Commission representing Washington and Oregon and Chairman of the Pacific Fishery Management Council. Mr. Anderson worked in the Washington Department of Fish and Wildlife for 21 years, serving as Director from 2008 to 2015.
- Brian J. Boyle, former Washington State Commissioner of Public Lands. Mr. Boyle served three four-year terms as the elected head of the Washington Department of Natural Resources.
- Jim Buck, former member of the Washington State House of Representatives (24th District). Mr. Buck, who served six terms, was Chair of the Natural Resources Committee and served as a member of the Governor's Council on Natural Resources.
- Bruce Dammeier, Executive of Pierce County, the second most populous county in Washington State. Prior to be being elected Pierce County Executive in 2016, Mr. Dammeier served as a member of the Washington State Senate and in the State House of Representatives.
- Robert J. Drewel, former Executive of Snohomish County. In addition to serving as County Executive for 12 years, Mr. Drewel served as Executive Director of the Puget Sound Regional Council from 2002 until 2014.

- Joe Fitzgibbon, Washington State Representative. Mr. Fitzgibbon is Chair of the Environment Committee and a member of the Appropriations and Agriculture and Natural Resources committees.
- Karen Fraser, former Washington State Senator. In addition to 24 years of service in the State Senate, Ms. Fraser served in the State House of Representatives, on the Thurston County Board of County Commissioners, and as President of the Washington State Association of Counties. Ms. Fraser was Mayor of Lacey, Washington from 1976 until 1980.
- Joe McDermott, Chair of the King County Council. Mr. McDermott previously represented West Seattle, Burien, White Center, and Vashon and Maury Islands in the Washington State Legislature for a decade.
- Ralph Munro, former Secretary of State of Washington. In addition to serving as Secretary for five elected terms (1980-2001), he served as Chair of the Shared Strategy for Puget Sound Board of Directors, a bipartisan salmon recovery effort.
- Debbie Regala, former Washington State Legislator. Ms. Regala served in the State Senate from 2001-2013 and in the State House of Representatives from 1995-2000, including as Co-Chair of the Committee on Natural Resources.

- Ron Sims, former Executive of King County. In addition to serving 12 years as King County's Executive, Mr. Sims also served as Deputy Secretary for the U.S. Department of Housing and Urban Development.

INTRODUCTION AND SUMMARY OF ARGUMENT

Healthy salmon stocks are vital to Washington's economy and culture. Salmon fisheries bolster the State's coffers, furnish tens of thousands of jobs, and provide recreation and nourishment to many residents. Simply put, salmon are essential to Washington's way of life.

Despite their undeniable value, salmon stocks have declined precipitously over the last several decades. The Washington Legislature regards the degradation of this vital resource as nothing short of a "crisis," which calls for an "immediate[]" response. WASH. REV. CODE § 77.85.005 (Salmon Recovery Act). The response envisioned by the Legislature depends on action at the local level, as well by the State, to protect vulnerable watersheds and the fish habitat therein. Unlike local and tribal governments, however, the State has not held up its end of the bargain.

Even in the face of budget constraints, local governments have taken up the mantle of restoring Washington's dwindling salmon stocks. King County, for example, works with federal and state agencies, Indian tribes, cities, and non-profit organizations to make significant investments in implementation of

salmon conservation and recovery plans, including removal of fish passage barriers. These efforts have yielded positive results—namely, the completion of hundreds of conservation projects and the restoration of salmon habitat, including access to creeks and side channels that were previously disrupted by barrier culverts. The success of these efforts stands as proof that, by working collaboratively, federal, state, tribal, and local entities can serve the common public interest, restoring degraded salmon populations and habitat to a healthy sustainable condition.

The State's position in this case threatens that common public interest. Throughout this litigation, the State has contended that it has no responsibility to ensure fish passage and could "block every salmon-bearing stream into Puget Sound" without violating treaties signed by Indian tribes that ensured a permanent right to take fish that had sustained the tribes for centuries. Pet. App. 8. That argument flouts the "legal and moral obligation" the State has to the tribes, as well as to Washington residents who have likewise come to depend on salmon for economic and nutritional sustenance. WASHINGTON DEP'T OF FISH AND WILDLIFE, FISH PASSAGE: A SENSE OF URGENCY ("FISH PASSAGE").[2] It also unwinds decades of work with local and tribal governments to protect and restore habitats across the Puget Sound region.

As *amici* can attest, resolving Washington's "salmon crisis" requires leadership. That leadership

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[2] https://wdfw.maps.arcgis.com/apps/Cascade/index.html?appid=e3cc75ec9da04bedb732ab941a5911b8.

falters when the State chooses to wage legal battles rather than working cooperatively with federal, local, and tribal officials towards their common goal. As Washington's own Commissioner of Public Lands put it, rather than "fighting *** over who should do what," the State should be joining local and tribal officials in "rolling up [their] sleeves, standing shoulder to shoulder and investing *** limited time, energy and resources towards saving salmon for future generations." App. to Br. of Resp't Tribes in Opp'n at 1a (Letter from Hilary Franz, Washington Commissioner of Public Lands, to Bob Ferguson, Washington Attorney General (Aug. 11, 2017)) ("Franz Letter").

ARGUMENT

REPLACING BARRIERS TO SALMON PASSAGE SERVES THE PUBLIC INTEREST

A. Healthy Salmon Populations Benefit All Washingtonians

Since time immemorial, Indian tribes in the Pacific Northwest have been "heavily dependent for their livelihoods on runs of salmon *** that c[o]me up the rivers in great numbers to spawn." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 179 (1977) (Brennan, J., dissenting in part). "[N]ot much less necessary to the existence of the Indians than the atmosphere they breathed," these anadromous fish have been central to the tribes' cultural, culinary, and economic identity. *United States v. Winans*, 198 U.S. 371, 381 (1905). Salmon were also central to the series of treaties the tribes

signed with the United States relinquishing the bulk of their territory. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Today, reliance on salmon is not limited to Indian tribes. Over the roughly 160 years since the tribes relinquished their ancestral lands, non-Indian settlers in those territories increasingly came to share in a "unifying dependence" on this precious resource. *Washington State Commercial*, 443 U.S. at 664. Salmon are essential to Washington's contemporary economy and culture, with commercial and recreational fisheries providing tens of thousands of jobs, over a half billion dollars in annual personal income, and recreation and sport to thousands of Washingtonians. *See* Washington Dep't of Fish and Wildlife, *Making Way for Salmon*, YOUTUBE (published Jan. 26, 2017) ("*Making Way for Salmon*")[3]; *see also* State Br. 9.

The State does not deny the vital role salmon play in the lives of its citizens. Even as it challenges the district court's injunction, the State concedes that its "own self-interest and responsibility to its residents" demand the renewal of salmon habitats. Br. 41. That concession is not surprising: Outside this litigation, state officials have long recognized the importance of maintaining healthy salmon populations. According to the Washington Department of Fish and Wildlife, "[s]almon are

[3] https://www.youtube.com/watch?v=X7z5anXzm0k.

important to all of us in Washington. They matter socially, they matter culturally, and they matter economically." *Making Way for Salmon* at 00:10-00:17. As the Governor put it, the State has a "moral obligation to restore wild salmon," in addition to a legal one, because "[e]very investment we make in salmon recovery is an investment we make in our future." FISH PASSAGE, *supra*.

As this bipartisan group of *amici* reflect, the commitment to salmon restoration crosses party lines. As a Republican state representative recently observed, "salmon recovery is *** an obligation" that requires "efficient[] and aggressive[]" action because nothing less than "[t]he future of [the] state" depends on it. J.T. Wilcox, *Remove Barriers to Preserve Salmon Runs for Future Generations*, THE SEATTLE TIMES (Feb. 6, 2018).[4]

B. The Obligation To Protect And Restore Salmon Habitat Is Ingrained In State Law

Consistent with the broad recognition that restoring salmon runs is essential to Washington's future (but contrary to the State's actions in relation to this case), state law is replete with legislative commands reflecting Washington's commitment to rejuvenating salmon stocks. *See, e.g.*, WASH. REV. CODE ch. 77.85, *et seq.* (Salmon Recovery Act); *id.* ch. 77.95, *et seq.* (Salmon Enhancement Program); *id.*

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[4] https://www.seattletimes.com/opinion/remove-barriers-to-preserve-salmon-runs-for-future-generations/

ch. 77.55, *et seq.* (Construction Projects in State Waters). Animating these provisions is the recognition that "repeated attempts to improve salmonid fish runs throughout the state of Washington have failed to avert" their depletion, which "threaten[s] the sport, commercial, and tribal fishing industries as well as the economic well-being and vitality of vast areas of the state." *Id.* § 77.85.005. When it passed the Salmon Recovery Act, the Washington Legislature made clear that the State's "salmon crisis" demanded an "immediate[]" response. *Id.*

The State's solution to the problem of depleted salmon runs depends on a "coordinated framework" in which "[l]ocal and regional recovery activities" play an "integra[l]" role. WASH. REV. CODE § 77.85.005. In findings supporting the Salmon Recovery Act, the State Legislature explained that "it is in the interest of the citizens of the state of Washington for the state to retain primary responsibility for managing the natural resources of the state, rather than abdicate those responsibilities to the federal government." *Id.* In the Legislature's view, this objective is best served "by integrating local and regional recovery activities into a statewide strategy that can make the most effective use of provisions of federal laws allowing for a state lead in salmon recovery, delivered through implementation activities consistent with regional and watershed recovery plans." *Id.* "A strong watershed-based locally implemented plan," the Legislature concluded, "is essential for local, regional, and statewide salmon recovery." *Id.*

This watershed-based, locally focused approach is evident throughout state law. Specifically, Washington laws require cities and counties to designate, plan for, and protect salmon populations and their habitat, and to do so in coordination with affected Indian tribes. For example, the Growth Management Act mandates protection of "critical areas," including fish and wildlife conservation zones, and directs cities and counties to "give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries." WASH. REV. CODE § 36.70A.172(1). The Act's implementing rules require that agencies utilize "best available science" in a way that integrates "salmon recovery efforts," and apply "special consideration[s]" through "measures that protect" not only anadromous fish but their habitat. WASH. ADMIN. CODE §§ 365-195-900, -925.

The Shoreline Management Act is similarly premised on the State's "cooperat[ion] *** with local governments." WASH. REV. CODE § 90.58.250(2). Rules implementing that Act require State and local officials to work "in conjunction with *** affected Indian tribes, [to] classify critical saltwater habitats and protect and restore seasonal ranges and habitat elements" in order to ensure that endangered, threatened, and priority species will "maintain [their] population[s] and reproduce over the long term." WASH. ADMIN. CODE § 173-26-221(2)(c)(iii)(B). Implementing rules further direct that "critical areas" are to be managed for "the protection of existing ecological functions and [the] *** restoration

of degraded ecological functions," *id.* § 2(b)(iv), and that "[r]estoration planning *** include incentives and other means to restore water connections that have been impeded by previous development," *id.* § 2(c)(iv)(B).

The Washington State Forest Practices Act also encourages state officials to develop watershed plans in collaboration with Indian tribes, this time with an eye towards addressing the cumulative impact of forest practices, including roads, on fish and water. *See* WASH. REV. CODE § 76.09.010.

C. Counties And Cities Have Implemented State Law Mandates Regarding The Protection And Restoration Of Salmon Populations And Their Habitat

No matter how much ink is spilled writing laws to protect and restore dwindling stocks, Washington's "salmon crisis" will continue unabated without sustained effort and leadership. Despite the State's recalcitrance, Washington's cities and counties are doing their part to ensure the sustainability of this vital resource.

King County, Washington's largest county, exemplifies these efforts. Among other things, King County has passed ordinances aimed at protecting "critical areas" from degradation, safeguarding the shoreline and its abundant natural resources, responsibly managing stormwater, and ensuring that clearing and grading land for development is done responsibly, with minimal harm to the environment.

See KING CTY. CODE § 21A.24 (Critical Areas); *Id.* tit. 9, *et seq.* (Surface Water, Stormwater and Groundwater Management); *Id.* § 16.82 (Clearing and Grading).

In addition to local ordinances, King County's state-law mandated focus on habitat restoration is evident in its Comprehensive Plan—a long-term policy planning document that guides land use and development regulations throughout the County. The Comprehensive Plan affirms the County's commitment to salmon recovery and also reflects its recognition of the particular obligations owed to Indian tribes. "The protection and recovery of salmonid species that are listed under the Endangered Species Act and encompassed by tribal treaty rights," the Plain affirms, "are and will continue to be a significant priority for King County." 2016 KING COUNTY COMPREHENSIVE PLAN at 5-68 (updated Dec. 4, 2017). The Plan further states that "[t]he listing of a species under the Endangered Species Act and decline of tribal treaty right protected species are cause for great concern, because wild Pacific salmon have great environmental, cultural, economic, nutritional, recreational and symbolic importance to local communities, in particular tribal communities, in the entire Puget Sound region." *Id.*

Reflecting its commitment to tribal communities, King County "[f]ocus[es] on federally listed salmonid species and declining stocks protected under tribal treaty rights first, tak[ing] an ecosystem

approach to habitat management[,] and seek[ing] to address management needs for other species over time." 2016 KING COUNTY COMPREHENSIVE PLAN at 5-69. The County is also committed to "participat[ing] in the Water Resource Inventory Area [(WRIA)] salmon recovery plan implementation efforts and in other regional efforts to recover salmon and the ecosystems they depend on." *Id.*

The County's past conservation and restoration projects demonstrate its effective implementation of these policies. When the federal government listed Puget Sound Chinook salmon as threatened under the Endangered Species Act in 1999, local governments in King County worked together to address the problem through a coordinated, regional approach. King County formed two watershed-based salmon recovery forums—WRIAs—and participated in two others, to guide multi-jurisdictional partnerships. WASH. REV. CODE. § 77.85.090. Those partnerships put in place science-based salmon recovery plans driven by a commitment to building sustainable, harvestable salmon populations. The County's efforts yielded impressive results: Combined, the four WRIAs have completed hundreds of conservation projects, representing an investment of approximately $300 million.

D. Removing Barriers To Fish Passage Is A Critical Component Of Salmon Restoration Efforts

The State observes in its brief that existing culvert designs are "often difficult for fish to pass

because they increase[] water velocity or turbidity [or] be[come] blocked by debris." Br. 19. For that reason, the State explains, it is "identifying fish-barrier culverts under state highways and replacing them." *Id.*

The State's acknowledgment that at least some barrier culverts require replacement is in line with longstanding policy and practice. Two decades ago, the State's Fish Passage Task Force reported that barrier culverts are a "key factor" in the degradation of wild salmon populations, concluding that, "the creation of new barriers must be prevented and the rate of barrier correction must be accelerated if Washington wild salmon *** stocks are to recover." JA 147a. Around the same time, Washington's Department of Fish and Wildlife (WDFW) and State Department of Transportation (WSDOT) reported that WSDOT culverts alone blocked an area of approximately 1.6 million square meters of fish habitat, and estimated that replacement of those culverts would yield 200,000 additional adult salmon each year.[5] JA 430a; *see* Pet. App. 109a. In addition, the State's Joint Natural Resources Cabinet published a report warning that "[u]nnatural physical barriers interrupt adult and juvenile salmonid passage in many streams, reducing productivity and eliminating some populations. *** These structures block fish access to an estimated 3,000 miles of freshwater spawning and rearing

[5] This number is based on a partial inventory. The actual number is far higher.

habitat." STATE OF WASHINGTON, EXTINCTION IS NOT AN OPTION: STATEWIDE STRATEGY TO RECOVER SALMON II. 23-24 (Nov. 1999)[6]; *see* Pet. App. 160a.

Consistent with the recognition that barrier culverts degrade salmon stocks, Washington passed laws intended to ensure that fish can complete their normal migration to and from the Pacific Ocean unimpeded. Specifically, Washington law mandates the "expedite[d] *** removal of human-made or caused impediments to anadromous fish passage," WASH. REV. CODE § 77.95.160(2)(a), "based on the principle of maximizing habitat recovery," *id.* § 77.95.180(1)(b); *see also id.* § 77.57.030. (imposing fish-way requirements, including obligation to allow fish passage on non-state barrier culverts). Despite these legislative mandates, however, the State's efforts at fish barrier removal are woefully inadequate. At its current pace, the State will not complete replacement of its blocking culverts for over 100 years. Pet. App. 160a-161a, 163a.

E. Localities Are Taking Steps To Remove Barriers To Fish Passage

The State's breach of its obligations to remove barriers to fish passage stands in stark relief to the proactive efforts of cities, counties, tribal governments, and other local entities.

King County is again illustrative. In addition to long-standing participation in collaborative WRIA-

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[6] https://www.rco.wa.gov/documents/gsro/1999StatewideStrategyRecoverSalmon.pdf.

based salmon recovery efforts, the County is working with federal, state, tribal, and city officials to develop a fish passage program for watersheds within its jurisdiction. This program will identify barriers to fish passage, assess habitat and fish population restoration potential, coordinate with other protection and restoration actions, and sequence and accelerate investments to achieve the greatest benefits for salmon recovery.

The County's financial investment in this effort has been substantial. Not including investments made through the WRIAs, King County is investing more than $7 million to remove barrier culverts in the current biennium. Much more investment will be made.

Critically, the County is also spearheading public-private-tribal partnerships to identify non-state-owned culverts that impede salmon passage and to invest funds in their replacement. Recently, the County partnered with the private owner of land encompassing a portion of Ebright Creek in the City of Sammamish, where an undersized culvert had blocked fish passage for 50 years. After the culvert was replaced, kokanee salmon runs returned almost immediately, and that productivity "created the cornerstone" of the area's salmon recovery effort. *Making Way for Salmon* at 3:15-4:55.

Floodplain restoration projects in King County also provide a striking example of the potential benefits to salmon populations from removing barriers to fish passage. The Rainbow Bend

Floodplain Restoration Project on the Cedar River reduced flood hazards and reconnected 40 acres of open space and floodplain. The project created side channel habitat for spawning Sockeye and Chinook salmon and also created important backwater rearing habitat for juvenile salmon. The success of the project was quickly evident: Salmon immediately began using the re-opened constructed and restored habitat for spawning and rearing.

F. The State's Position Undermines Efforts To Protect And Restore Salmon Habitat And Salmon Populations

Successes like those at Ebright Creek and the Cedar River, as well as broader collaborative efforts to protect and restore salmon habitat through WRIA forums, reinforce *amici*'s commitment to working cooperatively with federal, state, and tribal partners to restore salmon runs. *Amici* share the State's view that maintaining salmon populations is vital to Washington's cultural, environmental, and economic vitality, and also share the belief that barrier removal is critical to the health of salmon populations. *Amici*, however, do not share the State's refusal to live up to those words in this case.

That is because the State's truculent position threatens to undermine critical restoration efforts. The State asserts that non-state owned barriers might prevent salmon passage even if the state-owned culverts are replaced. Br. 21, 53. But that assertion ignores the extensive local government efforts, in conjunction with tribes and private actors

(as documented above), that are already underway to coordinate protection and restoration of habitat, including the removal of non-state-owned barriers. Likewise, the State's assertion that it is being forced "to bear the entire cost of replacing culverts," Br. 58, overlooks local efforts (not to mention that a "large portion of WSDOT's funding comes from the United States," Pet. App. 171a).

As the Commissioner of Public Lands wrote to the Attorney General, the State's appeal to this Court represents "yet another chapter of fighting *** over who should do what." Franz Letter at 1a, *supra*. In place of that litigious approach, the State should be "work[ing] collectively and focus[ing] on actions that address and actively aid the many concerns that *** tribal governments—and so many *** non-tribal residents—have *** rais[ed] for years." *Id.* at 1a-2a. Only sustained cooperation between the State and tribal and local governments will resolve the crisis that threatens Washington's way of life. The State owes no less to its residents—present and future—and to the tribes that were promised that the salmon that sustained them for centuries would endure for generations to come.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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